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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 625

DORY AUERBACH, IRVING GOTTLIEB and
DAVID PROSSER RANDELL,
Petitioners,

versus

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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The petitioners, Dory Auerbach, Irving Gottlieb and David Prosser Randell, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit dismissing petitioners' appeal.

JUDGMENTS BELOW

The Order of the District Court appealed from is set out at Appendix C, *infra*, p. 25, R. 103. The judgment of the Court of Appeals dismissing the petitioners' appeal is set out at Appendix A, *infra*, p. 17.

JURISDICTION

The judgment of the Court of Appeals was entered June 18, 1965. (Appendix A, *infra*, p. 17.) Petition for rehearing *en banc* was denied July 30, 1965. (Appendix B., *infra*, p. 22.) By order of Mr. Justice Black on August 18, 1965, the time for filing a petition for certiorari was extended to September 28, 1965. The jurisdiction of this Court is invoked under Tile 28, United States Code, § 1254(1).

QUESTIONS PRESENTED

1. Where a mail fraud indictment charged defendants with having committed offenses in both Arizonia and Florida, and defendants moved successfully under Rule 21(b), Federal Rules Criminal Procedure, for an order transferring the case from the District of Arizona to the Southern District of Florida, is the district judge in the transferee (Florida) district vested with power to order the case retransferred to the District of Arizona?

2. Was an order of a district court retransferring a case from a transferee district back to the district court from which the case was properly transferred under Rule 21(b), Federal Rules Criminal Procedure, a "final order" and subject to review by appeal to the Court of Appeals?

STATUTE AND RULE INVOLVED

Title 18 United States Code, Federal Rules of Criminal Procedure:

> "*Rule 21. Transfer from the District or Division for Trial*
>
> "(a) * * *
>
> "(b) *Offense Committed in Two or More Districts or Divisions.* The court upon motion of the defend-

ant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

"(c) *Proceedings on Transfer.* When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division."

Title 28, United States Code, § 1291

"*Final decisions of district courts.*

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

STATEMENT

The petitioners were indicted under multiple counts in the District Court for the District of Arizona under 18 U.S.C. § 1341 for mail fraud, alleged to have taken place in Arizona and in the Southern District of Florida. (Appendix C, *infra*, pp. 27-36 R. 1-9) By proper and timely motion under Rule 21(b), F.R.Crim.P., petitioners sought and obtained from the Arizona District Court [1] a transfer of this case to the Southern District of Florida. After the case was lodged in Florida, Judge Charles Fulton, on his own motion, entered an Order of February 26, 1965, retransferring the case back to Arizona. The record disclosed no reason for the retransfer. There was nothing to

[1] The order of Judge William C. Mathes was dated July 27, 1964, Appendix C, *infra*, p. 23, R. 124.

show that the relative convenience of the parties would be served or that the nature of the offense required it. Petitioners filed an appeal to the Fifth Circuit Court of Appeals from Judge Fulton's Order of Retransfer. The government moved to dismiss the appeal for want of jurisdiction, the Fifth Circuit sustained that motion. Judge Brown filed a dissenting opinion. (Appendix A, *infra*, pp. 18-21). Petitioners filed a motion for rehearing *en banc* which was denied; Judge Brown again dissented. (Appendix B, *infra*, p. 22) The majority held the Order of Retransfer was not a "final" order and hence not appealable, citing *Holdsworth* v. *United States*, 179 F.2d 933 (CA-1, 1950) and *United States* v. *Brown*, 301 F.2d 664 (CA-4, 1962).

Judge Brown in his dissent noted that *United States* v. *Brown*, *supra*, relied on by the Circuit Court did not support the dismissal. The *Brown* case contained a factual situation in which the defendant sought a transfer of his case for a plea of guilty and disposition under Rule 20, F.R.Crim.P. After the transfer had been made, defendant then moved to dismiss the indictment rather than plead to the indictment as he asserted he was going to do. The case was retransferred to place it in *status quo*. The matters in the *Brown* case are different from the case at bar. The *Holdsworth* case, *supra*, 179 F.2d 933, concerned the transfer of a case from Massachusetts to Maine in the same Circuit and its retransfer to Massachusetts. The appeal from the retransfer order was dismissed for lack of jurisdiction; nevertheless the Circuit Court held that one district court judge may not review the transfer order of another district judge. (179 F.2d at p. 937). Judge Brown's dissent observed that unless the Fifth Circuit corrected Judge Fulton's obvious judicial error, the case would be on the way to Arizona. He then queried whether there was a basis for the Arizona district judge to review the action of Judge Fulton, i.e., whether Judge Fulton

ton made a mistake of law or abused his discretion. Judge Brown then posed the pertinent question, "who is right", the Arizona Judge or Judge Fulton, but more precisely, was Judge Fulton right. He considered it unrealistic to apply a rigid standard of "finality" to prevent review by appeal. (Appendix A., *infra*, p. 19)

Judge Brown, in dissenting, found the Order of retransfer "final" since it was the only Order Judge Fulton could ever enter in the case, and the time had passed for him to recall it. (Appendix A, infra, p. 18) He also noted that the holding of the majority was contrary to the opinions of this Court which has held that "finality" for appellate purposes is to be judged in practical terms, citing *Brown Shoe Co.* v. *United States*, 1962, 370 U.S. 294, 306, 82 S.Ct. 1502, 1513, 8 L.Ed. 2d 510, 524-25 (Appendix A, *infra*, at p. 20, ftn. 3), and *Gillespie* v. *U. S. Steel Corp.*, 1964, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (Appendix B, *infra*, at p. 22)

Judge Brown also demonstrated that the *per curiam* opinion of the majority dismissing the appeal ran counter to the Fifth Circuit's decisions, citing *United States* v. *Wood*, (CA-5, 1961), 295 F.2d 772, 779; *Kennedy* v. *Lynd* (CA-5, 1962) 306 F.2d 222, 228; *Hodges* v. *Atlantic Coastline* R. (CA-5, 1962), 310 F.2d 438, 443; *United States* v. *Mayton* (CA-5, 1964), 335 F.2d 153, 157; *McCoy* v. *Louisiana State Board of Educ.* (CA-5, 1964), 332 F.2d 915, 917, *Harris* v. *Gibson* (CA-5, 1963), 322 F.2d 780, 781; Wright, Federal Courts § 101 (1963); *McCoy* v. *Louisiana State Board of Educ.* (CA-5, 1965) ——— F.2d ——— [No. 21,567, May 24, 1965], which, in turn, cited numerous decisions of this Court in support. (Appendix A, *infra*, pp. 20-21)

Reasons for Granting the Writ

(a) *Loss of Valuable Procedural Rights*

The decision of the Fifth Circuit dismissing the appeal renders ineffective the clear pronouncements in Rule 21 (b) and (c), F.R.Crim.P., that the "interest of justice" requires that the Court "upon motion of the defendant *shall* transfer the proceedings * * * to another district * * * if it appears from the indictment * * * that the offense was committed in more than one district * * *." And in subsection (c): "When the transfer is ordered the clerk of the court shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding * * * and the prosecution *shall* continue in that district * * *." (Emphasis ours)

This Rule must mean what it says and that once the valid transfer of the Arizona indictment was entered "*the prosecution shall continue in the* [Southern District of Florida] *district*" and not in some other place. That order was conclusive as to the place of prosecution. The government might have sought review of this motion by mandamus and prohibition in the appellate court, but it did not do so. The order of the Arizona Court, entered after hearing, constituted its decision as to the place of trial and was final under Rule 21(c). "The prosecution" was *required* to "continue in that district." The retransfer of the case to Arizona constitutes a technique for escaping the consequences of the Arizona Court's order, which is procedurally indefensible. There is no support for it in any of the Rules. We have found no federal case supporting such a stratagem in the past. The practice has been severely criticized in *United States* v. *U. S. District Court for the Eastern District of Tennessee*, 209 F.2d 575 (CA-5, 1943), at p. 577, which held that a motion to transfer a prosecution begun in one district having jurisdiction of the subject matter to another district also having jurisdiction is addressed to the discretion of the dis-

trict judge to whom the motion is presented. An order transferring the case for trial in the other district is not reviewable by the judge of the latter district. For support, *Holdsworth* v. *United States*, 179 F.2d 933 (CA-1, 1950) was cited.[2]

In *Holdsworth* v. *United States*, 179 F.2d 933, 937 (CA-1, 1950) the First Circuit condemned the attempt at retransfer of a case having been previously ordered transferred, stating that the transferee district judge had no more authority to review the transfer order than did the First Circuit Court of Appeals.

We submit that Rule 21 compels a similar result here. Rule 21(c) *requires* "the prosecution" to "continue" in the transferee forum and thus by application of its plain terms, prohibits trial elsewhere on the charge. Congress made no exceptions to Rule 21 which would permit the interference against which petitioners complain.

There is respectable authority in the Ninth Circuit for the rule that when a judge, even in a multi-judge district, makes or denies an interlocutory order it should not be reconsidered by another judge. "Orders of United States Courts, deliberately made after proper notice and hearing, and subject to review, are not to be lightly changed by any judge of the trial court." *Tanner Motor Livery Ltd.* v. *Avis, Inc.*, 316 F.2d 804, 810 (CA-9, 1963).

United States v. *U. S. District Court for the Eastern District of Tennessee*, *supra*, 209 F.2d 575, involved a "judicial stalemate" between two district court judges in the same circuit as to which court should try a case which was transferred and retransferred between them. The appellate court [209 F.2d at p. 576] in resolving the conflict said: "* * *; wherefore, it becomes the duty of this

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[2] It is strange that the *Holdsworth* case, *supra*, was also cited by the Fifth Circuit as a basis for dismissing the appeal below. (Appendix A, *infra*, p. 17).

court to resolve the conflict of opinion among trial judges in the same state in this procedural matter which is of practical importance now and perhaps in future cases." But at bar the "judicial stalemate" is between district judges in different circuits.[3] It follows that only this Court may resolve the conflict between them; the Fifth and Ninth Circuit Courts of Appeals may not have the supervisory power over trial courts outside of their circuits to correct the "judicial stalemate" created by the separate orders of transfer and retransfer. Unless this Court intervenes, the case will be on its way to Arizona and petitioners' valuable procedural rights granted by Rule 21(b) and the Sixth Amendment[4] to the United States Constitution will be lost. We agree with Judge Brown, as said in his dissent (Appendix A, infra, p. 19): "Upon what basis can the Arizona District Judge review the correctness of the action of Judge Fulton? * * * What is the Ninth Circuit to do in the event of a conviction? Does it have sufficient power over Judge Fulton who sits four Circuits and 3,500 miles removed to declare that Judge Fulton, amenable in our hierarchial system only through the Fifth Circuit, must undo his order of retransfer? What sort of mandate could the Ninth Circuit issue? It might, of course, reverse the case with directions to the Arizona District Judge to transfer it back to Florida. But that is what the Arizona Judge did long ago. The difficulty comes from the fact that

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[3] Judge William C. Mathes of the Southern District of California, presiding in Arizona by designation, transferred the case to the Southern District of Florida by his order of July 27, 1964 (Appendix C, *infra*, p. 23 (Ninth Circuit). Judge Charles B. Fulton of the Southern District of Florida entered his order of retransfer on February 26, 1965 (Appendix C, *infra*, p. 25). (Fifth Circuit)

[4] Sixth Amendment to the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *."

Judge Fulton, obviously for reasons conscientiously held, differs with the judgment of the Arizona District Judge. The question is: who is right? Or more precisely, was Judge Fulton right?" (Appendix A, *infra*, p. 19)

Only this Court's supervisory power over the various circuits is decisive.

The Fifth Circuit in the exercise of its supervisory powers should have resolved the "judicial stalemate" as the Sixth Circuit did in *United States* v. *U. S. District Court for the Eastern District of Tennessee, supra*, 209 F.2d 575. This Court should reconcile the discrepancy created by the Fifth Circuit's variance with the foregoing decisions to avoid a troublesome precedent. On its face, Judge Fulton's order of retransfer would tend to create powers of review in a district judge whose personal views as to forum may differ from the judge who passed on the Rule 21(b) motion of a defendant.

The plain words of Rule 21, F.R.Crim.P., and the Notes of the Advisory Committee (18 U.S.C. Rule 21, notes) demonstrate that justified transfer is a privilege accorded only defendants, not the government. Nor is there mention of power in a district court judge to effect retransfer. Unless this Court intervenes now, the result will be that the Florida district court will have asumed non-existent jurisdiction and retransfer power under Rule 21 to circumvent the valid transfer order of the Arizona Court entered after elaborate hearing as to the suitability of Florida as a forum fair to both sides.

We agree with the dissenting judge that nothing is "more awesome or final" than a decision which denies petitioner the right to be tried in his home district, particularly after a clear showing that it was in the "interest of justice" to have the trial there. The arbitrary review by Judge Fulton setting aside Judge Mathes' transfer order has that result. We think this breaks new ground in this Court. Important questions of the fair

administration of criminal justice under the Rules of Criminal Procedure (Rule 21) are presented.[5] The procedural innovation of Judge Fulton is a fundamental evasion of the purposes of Rule 21(b). Judge Fulton's order of retransfer to Arizona is "final"; it violated the plain meaning of Rule 21(c) and deserves the condemnation of this Court.

If this relief is not granted, and if the Florida court's actions are permitted to stand, the effect will be to rewrite Rules 21(b) and (c) to provide that if a court determines that the prosecution should be transferred, it will be transferred only to such forum as the *transferee* court shall select as fair.

(b) *"Finality" of the Order of Retransfer.*

We agree with the dissenting judge that "an order which is unreviewable through appellate proceedings at any place at any stage at any time which has the effect of denying to a citizen the statutory privilege to be tried in his home district is as "final as any law could conjure up." The Fifth Circiut should have "determined whether Judge Fulton was right or not." (Appendix A, *infra*, p. 21)

With all the uncertainties on "finality" and "appealability", this appears to be an ideal case for correction by the supervisory powers of the Circuit Court of Appeals. The Fifth Circuit's reluctance to do so requires this Court to speak so that the finality of transfers prescribed by Rule 21(c), F.R.Crim.P. may be protected and defendant's procedural rights stabilized.

The doctrine of conservation of judicial energies counsels decision now. The question is important and should

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[5] This Court has issued certiorari in cases such as *Upshaw* v. *United States*, 335 U.S. 410, 1948 (Rule 5); *United States* v. *Smith*, 331 U.S. 469, 1947 (Rule 33).

not be left in doubt. It is the doctrine of judicial energies that ordinarily supports the refusal of courts to review interim orders. However, here refusal to decide will make work, not reduce it. Until this issue is settled fresh problems will beset defense lawyers, judges and prosecutors.

Although there is no "final judgment" finally disposing of the case, valuable procedural rights are involved of a character to bring it within the "collateral order" rule [6] or the expanding concept of actual practical finality defined by this Court.

"But as this Court has often pointed out, a decision 'final' within the meaning of § 1291[7] does not necessarily mean the last order possible to be made in a case." *Gillespie* v. *U. S. Steel Corp.*, 1964, 379 U.S. at p. 148, 152, 85 S.Ct. at p. 308, 13 L.Ed.2d 199, citing *Cohen* v. *Beneficial Industrial Loan Corp.*, 1949, 337 U.S. 541, 545, 69 S.Ct. 1221, 1225, 93 L.Ed. 2d 1528. The dismissal by the Fifth Circuit for lack of "finality" is contrary to the numerous pronouncements of this Court that marginal cases coming within the "twilight zone" of finality are to be given a "practical rather than a technical construction." *Gillespie* v. *United States Steel Corp.*, *supra*, 379 U.S. 148, 152, 85 S.Ct. at p. 311; *Brown Shoe Co.* v. *United States*, 1962, 370 U.S. 294, 306, 82 S.Ct. 1502, 1513, 8 L.Ed.2d 510.

The Fifth Circuit's dismissal ignores this Court's practice to hold reviewable a ruling in the course of litigation that "was fundamental to the further conduct of the

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[6] The concept of finality has been imbued with significant strands of elasticity in "collateral order" cases. *Cohen* v. *Beneficial Industrial Loan Corp.*, 1949, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528, and *Gillespie* v. *United States Steel Corp.*, 1964, 379 U.S. 148; 85 S.Ct. 308, 13 L. Ed.2d 199.

[7] "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court."

case." *Gillespie* v. *United States Steel Corp.*, *supra*, 379 U.S. at p. 153, 85 S.Ct. at p. 311.

Thus, review has been granted in many situations where the order under challenge did not in fact terminate the litigation and was not in any real sense "final". Illustration may be found in cases where this Court has reviewed orders invloving issues, decision of which was deemed fundamental to the "further conduct of the case", for example, in:

Land v. *Dollar*, 1947, 330 U.S. 731, where, although the case still awaited trial, this Court held the challenged decision reviewable for the reason thus summarized by Mr. Justice Douglas (p. 734) [Note 2]): "Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.'"

United States v. *General Motors Corp.*, 1945, 323 U.S. 373, where this Court reviewed rulings on evidence notwithstanding the case had been remanded for a new trial. The Court observed, in an opinion by Mr. Justice Roberts (p. 377): "We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case."

The question presented here is equally "fundamental to the further conduct of the case", and Judge Fulton (Florida) having no discretion to set aside the transfer order of Judge Mathes (Arizona), the illegal order of retransfer of February 26, 1965 is appealable as "final". See, *Stack* v. *Boyle*, 1951, 342 U.S. 1, 6, 72 S.Ct. 1, 4, 96 L.Ed. 3.

It may be argued that mandamus or a proceeding in the nature of mandamus is the appropriate procedure by which to decide a "judicial stalemate". See, *United*

States v. *U.S. District Court for the Eastern District of Tennessee*, 209 F.2d 575 (CA-6, 1954), at p. 576:

> "Mandamus * * * is the appropriate procedure by which to decide the issue presented."

See, also, *United States* v. *U. S. District Court*, 334 U.S. 258, 268, 68 S.Ct. 1035, 92 L.Ed. 1351; *Ex parte United States*, 287 U.S. 241, 247, 53 S.Ct. 129, 77 L.Ed. 283.

But a distinction must be made between review by appeal and review by mandamus or prohibition. On appeal the question is whether the court's order was correct. In mandamus the review only tests whether, even in making an incorrect decision, the judge abused his discretion. "This problem of 'finality' is not to be tested by the vague possibility that some relief might just possibly be available through a petition for mandamus or prohibition. The availability of that remedy is uncertain. More so, the nature of the review in that device is markedly different since it subjects the appellate court to the rigid peremptory standard of 'abuse of discretion' in contrast to the broader review by appeal where our function is to determine whether the District Court's decision is right on its intrinsic merits. We have recognized this many times in declining mandamus and permitting resubmission to the trial court for possible certification and subsequent acceptance by us as an interlocutory appeal under 28 U.S.C.A. § 1292(b). [citing cases]." See Judge Brown's dissent, Appendix A, *infra*, at pp. 19-20, ftn. 2.

The Fifth Circuit could not permit resubmission for certification here under 28 U.S.C.A. § 1292(b) in a criminal case.* The issue, whether mandamus or appeal is the proper procedure to break a "judicial stalemate" in criminal cases, is ready for decision by this Court now.

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* 28 U.S.C. § 1292(b) provides in pertinent part: "When a district judge, in making a *civil action* order not otherwise appealable under this section * * *." (Emphasis ours)

The concept of "finality" has not been extended by this Court to "collateral orders" in criminal cases to the extent realized in civil cases. Comparing the broad scope permitted "finality" in civil cases as opposed to criminal cases this Court said in *DiBella* v. *United States*, 1962, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed. 614 (369 U.S. at p. 614):

> "Despite these statutory exceptions to, and judicial construction of, the requirement of finality, 'the final judgment rule (§ 1291) is the dominant rule in federal appellate practice' * * *. Every statutory exception is addressed either in terms or by necessary operation solely to civil actions. Moreover, the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of criminal law."

But petitioners have demonstrated that this case, unlike *DiBella*, *supra*, and *Cogen* v. *United States*, 1928, 278 U.S. 221, 227, 49 S.Ct. 118, 73 L.Ed. 275, cited therein, falls within the narrow exceptions to the final judgment rule. The *DiBella* case, *supra*, and others in that category, concerned appeals from motions granting or denying suppression of evidence and return of property. No effort is made here to "transmute an evidentiary ruling into an independent proceeding begetting finality for purposes of appealability", as suggested in *DiBella*, *supra*, 369 U.S. at p. 131, 82 S.Ct. at p. 660. The venue issue raised here by the "judicial stalemate" under Rule 21(b), F.R.Crim.P. is not "but a step in the criminal case preliminary to the trial thereof", *Cogen* v. *United States*, 1928, 278 U.S. 221, 227, 49 S.Ct. 118, 73 L.Ed. 275; it breaks new ground in the preservation of procedural rights as we said before.

Unless this Court intervenes, "When the time comes [to appeal the final disposition of the case] it will be too late effectively to review the present order and the rights

conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Cohen* v. *Beneficial Industrial Loan Corp,* 1949, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528.

In criminal cases it has been stated that a final judgment is the sentence. *Berman* v. *United States,* 1937, 302 U.S. 211, 212, 58 S.Ct. 164, 165, 82 L.Ed. 204. But it is a final *decision* that Congress has made reviewable. While a final judgment is always a final decision, there are instances, and this is one, in which a "final" decision is not a judgment. See Mr. Justice Frankfurter's concurring opinion in *Stack* v. *Boyle, supra,* 342 U.S. at p. 12, 72 S.Ct. p. 7.

Thus an order seeking to upset venue determined after hearing at the instance of the defendant (Rule 21(b), F.R.Crim.P.) can be reviewed without halting the main issues; it is entirely independent of the issue to be tried. See, *Stack* v. *Boyle, supra,* 342 U.S. at p. 12, 72 S.Ct., at p. 7.

A decision here appears to fall in that small class which finally determines claims of right separable from and collateral to, rights asserted in the main case, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. This Court has long given 28 U.S.C. § 1291 this practical rather than a technical construction. *Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U.S. 541, 546, 69 S.Ct. at p. 1225, citing *Bank of Columbia* v. *Sweeney,* 1 Pet. 567, 569; *United States* v. *River Rouge,* 269 U.S. 411, 414; *Cobbledick* v. *United States,* 309 U.S. 323, 328.

If for some reason this Court has placed a greater value on the loss of procedural rights to a civil defendant than on those of a criminal defendant under the finality rule (§ 1291), the time is now to balance the scales. Petition-

ers' dilemma was created through no fault of their own. Unless this Court intervenes no amount of preservation of rights during a trial in Arizona, 2,500 miles from their home, will restore to them the valuable procedural advantages they now stand to lose.

An adjudication now by this Court of the "judicial stalemate" will prevent recurrence of the arbitrary exercise of judicial power which can only injure defendants in the exercise of their procedural rights.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH J. LYMAN
Suite 702, Ring Building
1200-18th Street, Northwest
Washington, D. C.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22431

DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 18, 1965.)

Before JONES, BROWN and BELL, Circuit Judges.

PER CURIAM: The order of transfer of the district court is not final and hence is not appealable. *Holdsworth* v. *United States*, 1st Cir. 1950, 179 F. 2d 933; *United States* v. *Brown*, 4th Cir. 1962, 301 F. 2d 664. The appeal is

DISMISSED.

BROWN, Circuit Judge, dissenting:

The Court holds that a decision wholly unreviewable by appeal [1] in any Court any time anywhere, the effect of which is to deprive the appellant of the right to be tried in his home district where he says his witnesses are, is not final. I can think of nothing more awesome or final.

Auerbach was indicted under multiple counts in the District Court for the District of Arizona under 18 USCA § 1341 for mail fraud alleged to have taken place in Arizona and in the Southern District of Florida. By proper and timely motion, F.R. Crim.P. 21(b), Auerbach sought and obtained from the Arizona District Court a transfer of this case to the Southern District of Florida. Once the case was lodged in Florida, Judge Charles Fulton, on his own motion entered an Order transferring the case back to Arizona. The record before us is unilluminating on the reasons which led Judge Fulton to this decision, that is, whether on an appeal of evidential facts bearing on relative convenience, etc., or as a pure matter of law because of the peculiar nature of the crime alleged. *Cf. United States* v. *Choate*, 5 Cir., 1960, 276 F.2d 724; *United States* v. *Cashin*, 2 Cir., 1960, 281 F.2d 669; 18 USCA § 3237 (a). Auerbach has filed an appeal from that Order of retransfer. The Government has moved to dismiss the appeal for want of jurisdiction, and this Court sustains that motion.

This is not only a "final" Order. It is the only Order which Judge Fulton has entered or now can enter. We hold we cannot review it. And clearly, the time has now gone by for Judge Fulton to recall it. Unless we intervene

[1] As pointed out in note 2, infra, distinction must be made between review by appeal on the one hand and prohibition or mandamus, on the other. On an appeal, the question is whether the trial Court's order was correct. In mandamus the review tests whether, even in making an incorrect decision, the Judge "abused his discretion."

the case perforce is already on its way to Arizona. Upon what basis can the Arizona District Judge review the correctness of the action of Judge Fulton? Does the Arizona Judge have the right to say that Judge Fulton either made a mistake of law or, in the more awesome peremptory language frequently employed, "abused his discretion"? That means that Auerbach must stand trial in Arizona. If he is right in his request for a transfer to Florida, he is not to be subjected to any such arduous, perilous, and costly enterprise even though he might—and the might is a mighty big might—successfully obtain a reversal in the Ninth Circuit from a judgment of conviction. What is the Ninth Circuit to do in the event of a conviction? Does it have sufficient power over Judge Fulton who still sits in Florida four Circuits and 3,500 miles removed to declare that Judge Fulton, amendable in our hierarchial system only through the Fifth Circuit, must undo his Order of retransfer? What sort of mandate could the Ninth Circuit issue? It might, of course, reverse the case with directions to the Arizona District Judge to transfer it back to Florida. But that is what the Arizona Judge did long ago. The difficulty comes from the fact that Judge Fulton, obviously for reasons conscientiously held, differs with the judgment of the Arizona District Judge. The question is: Who is right? Or more precisely, was Judge Fulton right?

Is our system of "finality" so rigid, so unrealistic, so inelastic, so impractical that this impasse goes unreviewed because—of all things—it is not "final"?[2]

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[2] This problem of "finality" is not to be tested by the vague possibility that some relief might just possibly be available through a petition for mandamus or prohibition. The availability of that remedy is uncertain. More so, the nature of the review in that device is markedly different since it subjects the appellate court to the rigid premptory standard of "abuse of discretion" in contrast to the broader review by appeal where our function is to determine whether the District Court's decision is right on its intrinsic merits. We have recognized this many times in declining mandamus

Not less than a half dozen times since 1960, this Court, following the lead of numerous Supreme Court cases,[3] has held that "finality" for appellate purposes is to be judged in practical terms. And in everyone of those cases, we have held orders having no greater "finality" than this one to be appealable. *United States* v. *Wood*, 5 Cir., 1961, 295 F.2d 772; *Kennedy* v. *Lynd*, 5 Cir., 1962, 306 F.2d 222, 228; *Hodges* v. *Atlantic Coastline R.*, 5 Cir., 1962, 310 F.2d 438, 443; *United States* v. *Mayton*, 5 Cir., 1964, 335 F.2d 153, 157; *McCoy* v. *Louisiana State Board of Educ.*, 5 Cir., 1964, 332 F.2d 915, 917; *Harris* v. *Gibson*, 5 Cir., 1963, 322 F.2d 780, 781; Wright, Federal Courts § 101 (1963). Within the last few weeks, the Court for the second time in that case has again announced the rule in the plainest of language. "In determining what is an appealable order * * *, courts look not to terminology, but to 'the substantial effect of the order made.' Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188; Enelow v. New York Life Ins. Co., 293 U.S. 379; General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430; Ring v. Spina, 2 Cir., 1948, 166 F.2d 546," *McCoy* v. *Louisiana State Board of Educ.*, 5 Cir., 1965, —— F.2d —— [No. 21567, May 24, 1965].

In the face of these decisions the cases pressed by the Government and presumably relied on by the Court do not

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and permitting resubmission to the trial Court for possible certification and subsequent acceptance by us an an interlocutory appeal under 28 USCA § 1292(b). Ex Parte Tokio Marino & Fire Ins. Co., 5 Cir., 1963, 322 F.2d 113, 115; Borskey v. American Pad & Textile Co., 5 Cir., 1961, 296 F.2d 894; In re Humble Oil & Refining Co., 5 Cir. 1962, 306 F.2d 567; Hadjipateras v. Pacificica, S.A., 5 Cir., 1961, 290 F.2d 697.

[3] "The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final.' * * * A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure." Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 306, 82 S.Ct. 1502, ,8L.Ed. 510, 524-25.

support the dismissal. *United States* v. *Brown*, 4 Cir., 1962, 301 F.2d 664, is a retransfer within the same State and Circuit compelled by the defendant impliedly withdrawing his plea of guilty on which the initial transfer was obtained under F.R.Crim.P. 20. *Yeloushan* v. *United States*, 5 Cir., 1963, 313 F.2d 303, 305, far from supporting dismissal compels our taking the case. Judge Carswell stated the guide for us in words which match the plight of Auerbach: "In the event the damage of error, unreviewed before the judgment is definitive and complete, is deemed greater than the disruption caused by immediate appeal, then an appeal will lie even though the proceeding and order are clearly interlocutory in nature." *Holdsworth* v. *United States*, 1 Cir., 1950, 179 F.2d 933, cannot stand in the face of *United States* v. *Woods*, *supra*. More important, that case was a retransfer between Courts within the same (First) Circuit. Unlike our situation, there was a right to an effective appeal. Judge Goodrich for the Court pointed this out most plainly. "The order appealed from here will still be open to correction if and when judgment is reached on the principal issue of appellant's guilt. And by that time there is always the possibility that the prosecution will have failed, so that it may not be necessary for us to pass upon the order at all." 179 F.2d at 935.

An order which is unreviewable through appellate proceedings at any place at any stage at any time which has the effect of denying to a citizen the statutory privilege to be tried in his home district is as final as any the law could conjure up.

I think it is our duty to determine whether Judge Fulton was right or not.

I therefore dissent.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22431

DORY AUERBACH, IRVING GOTTLIEF AND DAVID PROSSER RANDELL,

Appellants,

versus

THE UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(July 30, 1965.)

Before JONES, BROWN and BELL, Circuit Judges.

The appellants' petition for rehearing en banc is hereby denied.

BROWN, Circuit Judge, dissenting:

To the cases previously cited in my dissent must now be added *Gillespie* v. *United States Steel Corporation*, 1964, —— U.S. ——, 85 S.Ct. 308, 13 L.Ed.2d 199.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. C-4619-PCT

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB,
Defendants.

ORDER

(Fed. R. Crim. P. 21 (b))

Upon consideration of defendants' motion to transfer proceedings from the United States District Court for the District of Arizona to the United States District Court for the Southern District of Florida, Miami Division, under Rule 21(b), Federal Rules of Criminal Procedure, and good cause therefor having been shown, it is by the Court this 27th day of July, 1964,

ORDERED that defendants' motion be and it is hereby granted and that the within cause be transferred from the United States District Court for the District of Ari-

zona to the United States District Court for the Southern District of Florida, Miami Division.

WM. C. MATHES
United States District Judge

C. A. MUECKE
United States Attorney

By /s/ Henry L. Zalut
HENRY L. ZALUT, Assistant
Attorneys for Plaintiff

/s/ Robert N. Axelrod
ROBERT N. AXELROD

/s/ Joseph J. Lyman
JOSEPH J. LYMAN
Attorneys for Defendants

APPROVED AS TO FORM:

/s/ Dory Auerbach
DORY AUERBACH, Defendant

/s/ David Prosser Randell
DAVID PROSSER RANDELL, Defendant

/s/ Irving Gottlieb
IRVING GOTTLIEB, Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 64-397-CR-CF

UNITED STATES OF AMERICA,
Plaintiff,

v.

DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB,
Defendants.

ORDER OF RETRANSFER

The twenty-two counts of the Indictment and the recently filed Bill of Particulars have been carefully inspected by the undersigned.

The gist of this cause of action is the use of the U. S. Mails. It is noted that in each count certain material is alleged to have been mailed from a city outside of the State of Arizona to a city within the District of Arizona; but it is likewise noted that there is no allegation in any count which charges that this material was either posted from or received in the Southern District of Florida.

In reaching this conclusion the Court has not ignored that portion of Paragraph 5 of Count I, which is incorporated by reference into each of the other counts, which charges that part of the purported fraud was the giving to the victims of the alleged fraud the false belief that they were dealing with a company headquartered in Arizona, whereas in truth and, in fact the mail addressed to the defendants at the Arizona addresses was not processed there but "forwarded to Lake Mead Rancheros, Inc., at Hollywood, Florida, or Miami, Florida." This allegation does not contain the charge that U. S. Mails were used in the

forwarding process, nor can that be implied. For these reasons, it is

ORDERED and ADJUDGED that this cause be and the same is hereby retransferred from the United States District Court for the Southern District of Florida to the United States District Court for the District of Arizona.

DONE and ORDERED at Miami, Florida, this 26 day of February 1965.

CHARLES B. FULTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR HE DISTRICT OF ARIZONA

INDICTMENT

No. C-4619 Pct.

Violation: 18 U.S.C. 1341 (Mail Fraud)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DORY AUERBACH, DAVID PROSSER RANDELL and
IRVING GOTTLIEB,
Defendants.

THE GRAND JURY CHARGES:

COUNT I

1. That during all or part of the times hereinafter mentioned LAKE MEAD RANCHEROS, INC., was a corporation organized under the laws of the State of Delaware and licensed to transact business in the State of Arizona, with principal offices at 2320 Madison Street, Hollywood, Florida, and 799 N. W. 62nd Street, Miami, Florida, and using mailing addresses in Kingman, Arizona of 1118 West Beale St., 1039 Fairgrounds Blvd., and 1033 West Beale St., and the defendants, DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB, were officers, directors and stockholders in said corporation and actively engaged in the business thereof.

2. That commencing prior to July 13, 1961, and continuing to the present time, the defendants, DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB, hereinafter referred to as "defendants", devised and intended to devise a scheme and artifice to de-

fraud and for obtaining money by means of false and fraudulent pretenses, representations and promises from persons residing throughout the United States, including but not limited to:

Charles E. Arrington, 20 Vine St., West Lynn, Mass.

Joseph A. Augello, 8830—182nd St., Hollis 23, New York

David L. Brill, 628 Grove Ave., Metuchen, New Jersey

Frank Catalano, 232 Courthouse Road, Franklin Square, L. I., New York

Tullio J. DiLorenzo, 24 Albermarle Place, Yonkers, 2, New York

Richard J. Eddy, 300 Montgomery St., Bloomfield, New Jersey

Otto L. Erbach, 33-15—81st Street., Jackson Heights 72, New York

William A. Farrell, 2503 East 19th St., Brookyln 35, New York

Donald E. Fitch, 3800 Brookcrest Place, Annandale, Virginia

Cameron W. Frazier, Box 498, U. S. Soldiers Home, Washington 25, D. C.

Dominic Giordano, 23 Netto Lane, Plainview, L.I., New York

Melvin S. Gould, 50 Eldorado Blvd., Plainview, L.I., New York

Francis E. Grenier, 29736 Hillbrook, Livonia, Michigan

Mrs. Ida Groves, 1170 Sledge Ave., Memphis, Tennessee

Martin Hanley, 180 Greenpoint Ave., Brooklyn 22, New York

Joseph Just, 6327 S. Kedvale Ave., Chicago 29, Illinois

Harry Korpela, 2225 Benson Ave., Brookyln, New York

Robert A. LaBrie, 122 Bradford St., Lawrence, Mass.

Clarence R. Lambert, 393 Buck Road, Holland, Penna.

William W. Mowrey, 34 Rexhame St., Roslindale 31, Mass.

Robert F. Parker, 8510 Superior, Centerline, Mich.

Mrs. Helen A. Perry, 35 Albion St., Bridgeport 5, Conn.

Harry Pray, 289 North Monroe Ave., Lindenhurst, L.I., New York

Miss Carolyn V. Sharpe, 38 St. Andrews Place, Yonkers, New York

Frank Scott, 2565 E. Midland Road, Indianapolis 27, Ind.

Dwayne Shirley, 324 Bacon St., Deerfield, Mich.

Donald J. Thomas, 10306 Oakland, Kansas City 34, Missouri

Don G. Walters, 114 Locust Road, Morton, Penna.

Mrs. Marian C. Zerbe, 4810 Junious, Dallas 10, Texas

Mrs. Marian K. Zisman, 6102 Horner St., Los Angeles, 35, Calif.

Miss Carol M. Zisman, 6102 Horner St., Los Angeles, 35, Calif.

and others to the Grand Jury unknown, said persons representing that class of persons who could be, and were, induced to purchase lots in Lake Mead Rancheros subdivisions located in Mohave County, Arizona, which said scheme and artifice is described more particularly hereinafter.

3. It was a part of said scheme and artifice to defraud that the defendants would and did cause Lake Mead Rancheros, Inc., to purchase or contract to purchase all or portions of seventeen (17) sections of range land, being odd-numbered sections 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35, in Township 25 North, Range 15 West, Gila and Salt River Base and Meridian, situated in Mohave County, Arizona, which said sections, or partial sections of land, were subdivided as Lake Mead Rancheros subdivision units 1 through 17, consisting of approximately 5,513 lots.

4. It was a further part of said scheme and artifice to defraud that the defendants would and did cause Lake Mead Rancheros, Inc., to offer the said lots in said Lake Mead Rancheros subdivision units for sale to the public on the deferred payment plan, with a down payment and monthly installment payments until payment in full of the purchase price, by means of advertising which they caused to be published in newspapers throughout the United States and in advertising material mailed by Lake Mead Rancheros, Inc., directly to prospective purchasers.

5. It was a further part of said scheme and artifice to defraud that the defendants would and did cause the mailing addresses of 1118 West Beale Street, 1309 Fairgrounds Blvd., and 1033 West Beale Street in Kingman, Arizona, to be used in the advertising and correspondence of Lake Mead Rancheros, Inc., for the purpose of creating in the minds of customers and prospective customers of Lake Mead Rancheros, Inc., the false belief that they were dealing with a company headquartered in Arizona or with operating offices near the property offered for sale; whereas in truth and in fact mail addressed to Lake Mead Rancheros, Inc., at these Kingman Arizona, addresses was not processed at Kingman at all, but forwarded to Lake Mead Rancheros, Inc., at Hollywood, Florida, or Miami, Florida.

6. It was a further part of said scheme and artifice to defraud that the defendants would and did, for the purpose of inducing persons to purchase lots in the said Lake Mead Rancheros subdivisions make, and cause to be made, in advertising literature published in newspapers and in other literature mailed to prospective purchasers the following deceptive, false and fraudulent representations, well knowing at the time that the representations would be, and were deceptive, false and fraudulent when made:

a. That the Lake Mead Rancheros subdivisions were located on a "through route to Lake Mead"; that "the through route from Highway 66 to Lake Mead winds gracefully through the Rancheros"; that "the Rancheros are ideally located only 6 miles north of U. S. 66, directly on Hackberry Road, the thoroughfare to the giant Lake Mead Recreational Area"; that "the Rancheros are ideally located only 6 miles north of U. S. 66, directly on Hackberry Road, the thoroughfare to two of the most favored sites in the giant Lake Mead Recreation Area"; that the Rancheros "are directly on Hackberry Road, main route to the Lake Mead Recreation Area";

b. That the Lake Mead Rancheros subdivisions were "Laid out, waiting for people", "livable now", "not raw, undeveloped", "fully developed" and "improved".

c. That Lake Mead Rancheros are a "jackpot investment", "among the finest investments anywhere", and "directly located in the path of Arizona progress".

d. That "Lake Mead Rancheros is located just a few miles from Kingman, near Lake Mead and Lake Mohave".

7. It was a further part of said scheme and artifice to defraud that the defendants would and did, about Sep-

tember, 1962, after approximately three thousand persons had purchased lots in the said original seventeen Lake Mead Rancheros subdivision units, commence negotiations for the purchase by Lake Mead Rancheros, Inc., of land at the junction of U. S. Highway 66 and Hackberry Road in Mohave County, approximately six miles distant from the nearest of their then existing seventeen subdivision units, which land was adjacent to U. S. Highway 66, along or near which highway there were existing power and telephone lines and a water pipe line carrying water to the City of Kingman, Arizona, and would and did cause Lake Mead Rancheros, Inc., to enter into an agreement with the Arizona Land Title & Trust Company of Tucson, Arizona, on or about January 2, 1963, for the purchase of such land, that land being all of Section 31 lying north of U. S. Highway 66, in Township 24 North, Range 14 West, Gila & Salt River Base and Meridian, in Mohave County, Arizona, which said Section 31 is crossed by U. S. Highway 66, said purchase agreement providing for the first release of land thereunder to the vendee upon payment of the sum of $51,000.00, which payment is due under the terms of said agreement on or before December 20, 1963, and would and did, on or about January 15, 1963, cause that portion of the said Section 31 situated north of U. S. Highway 66 to be subdivided as Lake Mead Rancheros subdivision unit No. 20.

8. It was a further part of said scheme and artifice to defraud that the defendants would and did, for the continuing purpose of inducing persons to purchase lots in the said Lake Mead Rancheros subdivision units, make and cause to be made in advertising literature published in newspapers and in other literature mailed by Lake Mead Rancheros, Inc., to lot owners and prospective lot purchasers the following additional deceptive, false and fraudulent representations, commencing about the middle of September, 1962, and continuing to on or about Janu-

ary 2, 1963, well knowing at the time that the representations would be, and were, deceptive, false and fraudulent when made:

a. "Build in a new community coming to life!—A new community is about to come to life—and you can have a part of its future! Lake Mead Rancheros has always been one of the best long-range investments you could make . . . but now your investment dollar gets much more! We have acquired COMPLETE UTILITY SERVICES! This means you can own a king-sized western estate . . . with ROADS, and ELECTRICITY, WATER and PHONES available. Obviously, the presence of utilities makes the Rancheros even more rewarding as investment property . . . for once the community takes shape and homes go up, you can subdivide your 1¼ acres into smaller homesites, for sale at a profit";

b. "ROADS, WATER, ELECTRICITY, PHONES. Every Ranchero is laid out, waiting for you! Piped water, electricity, and phone service available now in the building area at no extra cost. A community is about to come to life . . . in an area already in great demand!";

c. "We have now acquired the land fronting on U. S. 66, in order to offer the vital services you require for comfortable, convenient, wide-open western living! After months of negotiation and frustrating delay, LMR management was successful in getting the land extending down the Hackberry Road to Route 66. This is the vital acreage so necessary to transform the Rancheros from an investment for your future to an investment in a living community, ready for immediate occupancy. This land was the missing link in establishing an orderly develop-

ment pattern. Now that we own it . . . watch us grow!";

d. "Power lines are already in on this newly acquired land, so LMR owners will get their power at the published rate of the Mohave Electric Cooperative", "Telephone lines traverse this property, too, so houses and businesses will be served by the Citizen's Utility Company of Kingman as the need for telephones develops";

e. "LAKE MEAD RANCHEROS IS READY FOR IMMEDIATE LIVING! We have just spent three weeks—a culmination of months planning—completing details that will guarantee all living facilities for every Ranchero. This means that for the same price as before, you can now own a king-sized western estate . . . with roads, and electricity, water and phones available . . . all the utilities necessary for a growing community";

f. "Those who wish to build immediately may always exchange their parcel for any other available anywhere in the property. In addition, you may exchange your tract for one in the newly acquired land—at no additional cost—at any time within the next three years, providing you build within this period".

9. It was a further part of said scheme and artifice to defraud that the defendants would and did scheme to mislead and deceive prospective purchasers and purchasers of lots in Lake Mead Rancheros subdivisions by use of a falsely labeled photograph, specifically a photograph appearing in an advertising brochure used by Lake Mead Rancheros, Inc., and mailed to prospective lot purchasers, showing land with a power line existing thereon and the statement below the picture: "NOW YOU SEE IT! The Valley of the Music Mountains . . . location of Lake Mead

Rancheros. This is the land as it looked on June 16, 1961, prior to any development work."; well knowing at the time said pretenses and representations were made that they were deceptive, false and fraudulent.

10. It was a further part of said scheme and artifice to defraud that the defendants would and did scheme to mislead and deceive prospective purchasers and purchasers of lots in the said Lake Mead Rancheros subdivisions by withholding and failing to disclose in the advertising of Lake Mead Rancheros, Inc., the material fact that the various Lake Mead Rancheros subdivision units consisted of only the odd-numbered sections of land in a checkerboard pattern in an area where all the even-numbered sections of land are owned by the federal government and subject to use for grazing purposes.

11. On or about September 17, 1961, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants knowingly caused to be delivered by mail at Kingman, within the State and District of Arizona, according to the direction thereon, a letter containing a $10.00 check, mailed by Otto L. Erbach, 33-15—81st, Jackson Heights 72, New York, and addressed to Lake Mead Rancheros, Kingman, Arizona, in violation of 18 U.S.C. 1341.

COUNT II

1. The Grand Jury realleges, with the same force and effect as though fully set forth in detail herein, all of the allegations contained in paragraphs 1 through 10 of Count I of this Indictment, and further alleges;

2. On or about October 1, 1961, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants knowingly caused to be delivered by mail at Kingman, within the State and District of Arizona, according to the direction thereon,

a letter containing a $1.00 check, mailed by Harry E. Pray, 289 North Monroe Ave., Lindenhurst, L.I., New York, and addressed to Lake Mead Rancheros, Kingman, Arizona, in violation of 18 U.S.C. 1841.

* * * *

[Counts III through XXII are similar in all respects to Count II, except for the date of the transaction and name of the customer involved]

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 625

DORY AUERBACH, IRVING GOTTLIEB AND DAVID PROSSER RANDELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. 17–21; R. 182) is reported at 347 F. 2d 742.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1965. A petition for rehearing en banc was denied on July 30, 1965 (Pet. 22; R. 204). On August 18, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including September 28, 1965, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

791-754—65

RULE INVOLVED

Rule 21(b) of the Federal Rules of Criminal Procedure provides:

> **Offense Committed in Two or More Districts or Divisions.** The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

QUESTION PRESENTED

Whether a district court's order, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, transferring a criminal case back to the district of indictment from which it had previously been transferred, is a "final" order for purposes of appeal.

STATEMENT

A 22-count indictment filed on March 14, 1963, in the United States District Court for the District of Arizona charged petitioners with mail fraud in violation of 18 U.S.C. 1341 (R. 1–17; Pet. 27–36). The indictment alleged that petitioners were the officers of Lake Mead Rancheros, Inc., a Delaware corporation licensed to transact business and having a mailing address in Kingman, Arizona, but with principal offices in Florida. The scheme alleged was that petitioners fraudulently induced persons residing throughout the

United States to purchase certain range land in Mohave County, Arizona, by falsely representing that the land was located at ideally accessible sites and was fully developed and ready for "immediate living" with complete utility services. Each count of the indictment charged a separate mailing by a purchaser from a point in the United States to Kingman, Arizona. In a general description of the scheme it was alleged that the Arizona mailing address was used to lead the purchasers to believe that they were dealing with a company headquartered in Arizona when in fact the mail addressed to Kingman was not processed there "but forwarded to Lake Mead Rancheros, Inc., at Hollywood, Florida, or Miami, Florida" (R. 4; Pet. 30).

On August 16, 1963, petitioners moved pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure for an order transferring the cause to the United States District Court for the Southern District of Florida. They asserted, *inter alia*, that the indictment demonstrated that the acts charged took place in Florida, and that since all their defense and character witnesses were in the Miami area, it would be in the "interest of justice" to require transfer to that area (R. 29–54). After a hearing, District Judge Ling denied the motion (See Docket Entries; see also R. 163). Petitioners then filed a motion for rehearing and reconsideration of their motion to transfer (R. 86–90). The case was assigned to visiting Judge William C. Mathes (of California) sitting in the Arizona district. After a hearing (R. 139–179),

Judge Mathes granted the motion to transfer the case to the Southern District of Florida, Miami Division (R. 124, Pet. 23).

On February 26, 1965, Judge Charles B. Fulton, of the United States District Court for the Southern District of Florida, retransferred the case *sua sponte* to the United States District Court for the District of Arizona. The order of transfer recited that the indictment and a recently filed bill of particulars[1] had been carefully inspected, and that while the gist of the charge was the use of the United States mails, there was no allegation that material was either posted from or received in the Southern District of Florida. The order further noted that the allegation that the purported fraud involved forwarding material to Florida did not charge that the mails were used in the process, and for "these reasons" the cause was being retransferred (R. 132–133; Pet. 25).

The Court of Appeals for the Fifth Circuit (Judge Brown dissenting) dismissed an appeal from Judge Fulton's order to transfer on the ground that the order was not final and therefore not appealable.

ARGUMENT

Petitioners recognize that the requirement of finality as a condition for appellate review has been strictly

[1] Judge Mathes had ordered the government to file a bill of particulars stating wherein certain representations were claimed to be false and fraudulent (See R. 145–159; 128–131). At the same time he had denied a motion for a bill of particulars as to whether the offense occurred in more than one jurisdiction, noting that this was a question of law (R. 156–157).

applied in federal criminal law. As this Court said in *DiBella* v. *United States*, 369 U.S. 121, 126:

> Despite the se statutory exceptions to, and judicial construction of, the requirement of finality, "the final judgment rule is the dominant rule in federal appellate practice" 6 Moore, Federal Practice (2d ed. 1953), 113. Particularly is this true of criminal prosecutions. See, *e.g.*, *Parr* v. *United States*, 351 U.S. 513, 518–521. Every statutory exception is addressed either in terms or by necessary operation solely to civil actions. Moreover, the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law.

The decision of the court of appeals in this case is consistent with decisions of other circuits holding orders transferring criminal proceedings to be non-final. See *Holdsworth* v. *United States*, 179 F. 2d 933 (C.A. 1); *United States* v. *Brown*, 301 F. 2d 664 (C.A. 4).[2]

To treat Judge Fulton's order as lacking in finality does not deprive petitioners of appellate review "in any court any time anywhere," as Judge Brown suggested in dissent (Pet. 18). For if Judge Fulton

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[2] In the earlier case of *United States* v. *National City Lines*, 334 U.S. 573 (involving the application of the doctrine of *forum non conveniens* to a civil antitrust proceeding), this Court, expressing doubt as to whether the government had a right to appeal from an order of transfer in a criminal case, observed that the "precise point apparently has not arisen since the adoption of Rule 21(b), but there would seem to be no statutory basis for appeal from an order of this type." 334 U.S. at 594, n. 43.

was without authority to retransfer the case to Arizona, petitioners are entitled to have any conviction obtained in the Arizona court reviewed on appeal. See *Parr* v. *United States*, 351 U.S. 513, 518–519. Petitioners must, it is true, proceed to trial in Arizona before they can have the validity of Judge Fulton's decision reviewed. But this inconvenience has been held to be "one of the painful obligations of citizenship" (*Cobbledick* v. *United States*, 309 U.S. 323, 325) which may lawfully be imposed in the interest of preventing disruptive piecemeal appeals in criminal proceedings. See *Parr* v. *United States*, *supra* at 519–520.[1]

Indeed, if Judge Fulton's order amounted to an erroneous exercise of power, petitioners might have sought review in the Fifth Circuit by way of petition for a writ of mandamus. See *United States* v. *Cashin*, 281 F. 2d 669 (C.A. 2); *United States* v. *Choate*, 276 F. 2d 724 (C.A. 5). See also *United States* v. *United States District Court for the Eastern District of Tennessee*, 209 F. 2d 575 (C.A. 6) (involving, as here, a transfer of proceedings and a subsequent retransfer); *United States* v. *United States District Court*, 334 U.S. 258; *Ex parte United States*, 287 U.S. 241. This Court, in *Platt* v. *Minnesota Mining and*

[1] *Brown Shoe Company* v. *United States*, 370 U.S. 294, involved an appeal in a civil antitrust action under the Expediting Act. Likewise, *Gillespie* v. *United States Steel Company*, 379 U.S. 148, involved a civil action in which the court of appeals had considered on the merits the validity of a district court's order to strike parts of a complaint. Neither of these decisions concerned transfer orders or involved the disruption and delay of criminal proceedings.

Manufacturing Company, 376 U.S. 240, assumed without deciding that a petition for writ of mandamus was an appropriate means to review the refusal of a district court to transfer a criminal antitrust proceeding under Rule 21(b).

Although Judge Fulton's ruling was patently based upon his conclusion that, as a matter of law, the offense of mail fraud was not committed in Florida and could not be tried there, petitioners have never attempted to review that decision by petition for mandamus.* Nor have they suggested to this Court or to the court of appeals that their appeal be treated as a petition for such an extraordinary writ. They now state the issue presented as simply "whether mandamus or appeal is the proper procedure to break a 'judicial stalemate' in criminal cases * * *" (Pet. 13), and this question is fully settled by decisions of courts of appeals which are not in conflict.

Finally, we submit that this case is inappropriate for further review by this Court since it is entirely clear from earlier decisions of the Fifth Circuit that if Judge Fulton's order were reviewed on its merits by that court it would be sustained. See *United States* v. *Choate*, 276 F. 2d 724 (C.A. 5); *Kreuter* v. *United States*, 218 F. 2d 532 (C.A. 5); see also *Hagner* v. *United States*, 285 U.S. 427; *United States* v. *Cashin*,

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* Present counsel, at a hearing before Judge Mathes in Arizona on July 27, 1964 (before the first order of transfer) advised that reconsideration of Judge Ling's denial of petitioners' request for transfer had been asked in the light of *Platt* v. *Minnesota Mining and Manufacturing Co.*, *supra*, specifically noting that in that case review had been sought by way of mandamus (R. 163).

281 F. 2d 669, 674 (C.A. 2). Consequently, even if the court of appeals had treated petitioners' appeal as a petition for a writ of mandamus it would have been required to deny the writ. Review by this Court of the jurisdictional question cannot, therefore, affect the ultimate site of the trial and can only serve to delay further a proceeding which is already more than two-and-a-half years old.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1965.